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LCY v TWY

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-988–05 OF 2018
TENGKU MAIMUN, ABANG ISKANDAR AND MARY LIM JJCA
21 FEBRUARY 2019

C *Family Law — Divorce — Petition — Judgment entered in favour of respondent wife on custody, maintenance of children and distribution of matrimonial assets — Petitioner husband appealed against part of order of learned judicial commissioner — Whether order of guardianship and custody made without assessing evidence led for petitioner husband — Whether order for*
D *maintenance arbitrarily made without proof of expenses of children — Whether learned judicial commissioner erred in inclining towards equality of division of matrimonial home*

This was an appeal by the appellant/petitioner husband ('PH') against part of
E the order of the learned judicial commissioner ('JC') on a divorce petition filed by the PH against the respondent wife ('RW'), seeking for, inter alia, a dissolution of the marriage, custody of children and distribution of matrimonial assets. PH and RW were married on 23 December 2006. They were blessed with two children, a daughter ('LYR') and a son ('LXJ'). LYR was
F born on 23 March 2008 while LXJ was born on 23 September 2012. The matrimonial home was at No 14, Jalan Teratak, U8/96D, Bukit Jelutong, Shah Alam, Selangor. On 17 December 2015, a joint petition was filed and RW converted to Islam on 29 December 2015. On 21 January 2016, a decree nisi was granted which was to be made absolute after three months. Before the
G decree nisi could be made absolute, PH applied to set aside the decree nisi on the ground of RW's conversion. The High Court set aside the decree nisi and PH was given access to the children. On 23 February 2016, PH lodged a police report against RW on her behaviour after the decree nisi. On 24 February 2016, RW lodged a police report against the domestic worker ('PW14') for
H allegedly molesting LXJ. On 11 May 2016, PH filed the divorce petition. On 6 June 2016, an interim consent order was recorded whereby parties agreed, inter alia, that the children shall not be influenced into practicing any religion and the other term recorded was on the parties' alternate weekly care and control of the children. On 11 December 2016, PH was stabbed by RW
I repeatedly with a metal fork at Subang Jaya Medical Centre ('SJMC'), where LXJ was admitted. The trial of the petition commenced on 5 December 2016 and on 27 April 2018, the learned JC delivered her decision. Particularly on the issue of custody, maintenance and division of matrimonial assets, judgment was entered in favour of RW. Aggrieved by the order of the learned JC on

custody, maintenance of the children and the distribution of the matrimonial assets, PH appealed to this court. The issues for consideration were: (a) whether the sole guardianship and sole custody that was granted by the High Court to RW with only a weekend access to PH, was made without the learned JC assessing the evidence led for PH; (b) whether the order for maintenance was arbitrarily made without proof of expenses of the children; and (c) whether in making the order for the division of the matrimonial home, the learned JC failed to consider that it was acquired solely by PH and that the learned JC erred in inclining towards equality of division.

Held, allowing the appeal; and setting aside the orders of the High Court on guardianship, custody care and control of the children:

(1) There was no compelling reason to disturb the order of the learned JC on maintenance of the children. The amount awarded per child per month was reasonable in the circumstances of the case. More so when it was not submitted that the amount ordered to be paid by PH should be varied. What was submitted and prayed for by PH was for RW to contribute 30% of the maintenance for the children, which prayer had been dismissed (see paras 27–28).

(2) There was evidence led on the contributions made by RW for the improvement of the matrimonial home but Her Ladyship erred in granting 50% of the current market value to RW. Taking into account the extent of RW's contribution, what was reasonable would be for RW to be granted 25% of the current market value of the matrimonial home (see para 29).

(3) The assumption arrived at by the learned JC ie because PH had two companies to manage, he would have lesser time to take care of the children was erroneous and against the weight of evidence. The learned JC was plainly wrong in her evaluation of the evidence which formed the premise as to why, among others, she had granted guardianship and custody to RW (see para 31).

(4) The learned JC erred in doubting the veracity of the recording when there was overwhelming evidence including that of RW's own admission under oath that she had stabbed PH with a fork in front of the children. The learned JC had overlooked the fact that RW and PH had entered into a consent order dated 6 June 2016. To say that PH had not accorded RW cordiality, understanding and that he was impatient was not quite accurate. The court found no such provocation which could justify RW to consciously and deliberately injure PH in front of the children and in public. What happened at SJMC was the manifestation of the uncontrollable temper of RW (see paras 33–37).

(5) The acceptance of the evidence of RW on the allegations of sexual abuse by PW14 was erroneous as the learned JC failed to consider and evaluate the evidence adduced by several independent professional witnesses. Given the testimonies of the independent witnesses of the paediatrician, the child psychiatrist, the welfare officer and the police officer, the court found that the learned JC was plainly wrong in concluding that RW ('RW1') and her mother, RW2 were witnesses of truth and that there was inappropriate behavior by PW14. Not much weight could be attached to the notes of Dr Latchana a/p Tangarajo ('RW3') as the allegation that PW14 had inserted a pencil in LXJ's anus came about from the translation/interpretation of a Chinese doctor who did not testify. Furthermore this allegation was never put to PW14 herself, which supported the argument of PH that this allegation was an afterthought. In addition, the police report lodged by RW in February 2016 on the allegation of sexual abuse by PW14 in relation to the traditional treatment for the medical condition of LXJ, clearly could not be maintained in light of the circumstances of the case (see paras 40 & 47–49).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu/pempetisyen suami ('PS') terhadap sebahagian daripada perintah pesuruhjaya kehakiman yang bijaksana ('PK') mengenai petisyen perceraian yang difailkan oleh PH terhadap responden isteri ('RI'), memohon, antara lain, pembubaran perkahwinan, hak penjagaan anak dan pembahagian harta perkahwinan. PS dan RI telah berkahwin pada 23 Disember 2006. Mereka dikurniakan dengan dua orang anak, seorang anak perempuan ('LYR') dan seorang anak lelaki ('LXJ'). LYR dilahirkan pada 23 Mac 2008 manakala LXJ dilahirkan pada 23 September 2012. Rumah suami isteri adalah di No 14, Jalan Teratak, U8/96D, Bukit Jelutong, Shah Alam, Selangor. Pada 17 Disember 2015, petisyen bersama telah difailkan dan RI memeluk agama Islam pada 29 Disember 2015. Pada 21 Januari 2016, decree nisi dibenarkan yang akan menjadi mutlak selepas tiga bulan. Sebelum decree nisi menjadi mutlak, PS memohon untuk mengetepikan decree nisi atas dasar penukaran agama RI. Mahkamah Tinggi mengetepikan decree nisi dan PS diberikan akses kepada anak-anak. Pada 23 Februari 2016, PH membuat laporan polis terhadap RI mengenai tingkah lakunya selepas decree nisi tersebut. Pada 24 Februari 2016, RI membuat laporan polis terhadap pekerja domestik ('PW14') kerana didakwa mencabul LXJ. Pada 11 Mei 2016, PS memfailkan petisyen perceraian. Pada 6 Jun 2016, perintah persetujuan sementara telah direkodkan di mana pihak-pihak bersetuju bahawa, antara lain, anak-anak tidak akan dipengaruhi untuk mengamalkan mana-mana agama dan syarat lain yang direkodkan adalah pada penjagaan dan kawalan bersilih ganti mingguan pihak-pihak terhadap anak-anak. Pada 11 Disember 2016, PS ditikam oleh RI berulang kali dengan garpu logam di Pusat Perubatan Subang Jaya ('SJMC'), di mana LXJ dimasukkan. Perbicaraan

petisyen tersebut bermula pada 5 Disember 2016 dan pada 27 April 2018, PK yang bijaksana menyampaikan keputusannya. Terutama mengenai isu penjagaan, nafkah dan pembahagian harta perkahwinan, keputusan dibuat memihak kepada RW. Terkilan oleh perintah PK yang bijaksana mengenai penjagaan, nafkah anak-anak dan pembahagian harta perkahwinan, PS merayu kepada mahkamah ini. Isu-isu untuk pertimbangan adalah: (a) sama ada penjagaan tunggal dan hak tunggal yang diberikan oleh Mahkamah Tinggi kepada RI hanya dengan akses hujung minggu kepada PS, dibuat tanpa PK yang bijaksana menilai bukti yang mendahului kepada PS; (b) sama ada perintah untuk nafkah dibuat tanpa bukti perbelanjaan anak-anak; dan (c) sama ada dalam membuat perintah untuk pembahagian rumah sepencarian, PK yang bijaksana gagal untuk mempertimbangkan bahawa ia hanya diperoleh oleh PH dan PK yang bijaksana terkhilaf dalam memperincikan kesamaan pembahagian.

Diputuskan, membenarkan rayuan; dan mengetepikan perintah Mahkamah Tinggi mengenai penjagaan, pemeliharaan dan kawalan anak-anak:

(1) Tiada sebab yang meyakinkan untuk mengganggu perintah PK yang bijaksana tentang nakfah anak-anak. Amaun yang diberikan setiap anak sebulan adalah berpatutan dalam keadaan kes tersebut. Lebih-lebih lagi apabila tidak dihujahkan bahawa jumlah yang diperintahkan untuk dibayar oleh PS perlu diubah. Apa yang dikemukakan dan dimohon oleh PS adalah untuk RI menyumbang 30% daripada nafkah untuk kanak-kanak, yang mana telah ditolak (lihat perenggan 27–28).

(2) Terdapat keterangan yang membawa kepada sumbangan yang dibuat oleh RI untuk pembaikan rumah sepencarian tetapi beliau terkhilaf dalam memberikan 50% nilai pasaran semasa kepada RI. Mengambil kira sejauh mana sumbangan RI, apa yang wajar adalah untuk RI diberikan 25% nilai pasaran semasa rumah sepencarian (lihat perenggan 29).

(3) Andaian yang diterima oleh PK yang bijaksana iaitu oleh kerana PI mempunyai dua syarikat untuk diuruskan, dia akan mempunyai masa yang lebih sedikit untuk menjaga anak-anak adalah salah dan bertentangan dengan keterangan yang dikemukakan. PK yang bijaksana secara jelas salah dalam penilaiannya tentang keterangan yang membentuk premis mengapa, antara lain, beliau telah memberikan penjagaan kepada RI (lihat perenggan 31).

(4) PK yang bijaksana terkhilaf dalam meragui kebenaran rakaman apabila terdapat keterangan yang banyak termasuk pengakuan RI sendiri dengan sumpah bahawa dia telah menikam PS dengan garpu di depan anak-anak. PK yang bijaksana telah terlepas pandang hakikat bahawa RI dan PS telah memasuki satu perintah persetujuan bertarikh 6 Jun 2016. Untuk mengatakan bahawa PS tidak memberikan RI perdamaian,

persefahaman dan bahawa dia tidak sabar adalah tidak cukup tepat. Mahkamah mendapati tiada provokasi sedemikian yang boleh membenarkan RI secara sedar dan sengaja mencederakan PS di hadapan anak-anak dan di khalayak ramai. Apa yang berlaku di SJMC adalah manifestasi dari baran RI yang tidak terkawal (lihat perenggan 33–37).

(5) Penerimaan keterangan RI mengenai tuduhan penderaan seksual oleh PW14 adalah salah kerana PK yang bijaksana gagal mempertimbangkan dan menilai keterangan yang dikemukakan oleh beberapa saksi profesional bebas. Mengikut testimoni saksi bebas ahli pediatrik, pakar psikiatri kanak-kanak, pegawai kebajikan dan pegawai polis, mahkamah mendapati bahawa PK yang bijaksana adalah jelas salah dalam membuat kesimpulan bahawa RW ('RW1') dan ibunya, RW2 adalah saksi-saksi benar dan bahawa terdapat tingkah laku yang tidak sesuai oleh PW14. Tiada beban boleh dikaitkan pada nota Dr Latchana a/p Tangarajo ('RW3') sebagai tuduhan bahawa PW14 telah memasukkan pensil dalam dubur LXJ datang dari terjemahan/tafsiran seorang doktor Cina yang tidak memberi keterangan. Tambahan pula tuduhan ini tidak pernah diletakkan pada PW14 sendiri, yang menyokong hujahan PH bahawa tuduhan ini adalah satu yang difikirkan kemudian. Di samping itu, laporan polis yang dibuat oleh RI pada Februari 2016 mengenai tuduhan penderaan seksual oleh PW14 berhubung dengan rawatan tradisional untuk keadaan perubatan LXJ, jelas tidak dapat dikekalkan berdasarkan keadaan kes tersebut (lihat perenggan 40 & 47–49).]

Notes

For cases on petition, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4381–4392.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)

Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd [2007] 3 MLJ 597, FC (refd)

KO (an infant), Re [1990] 1 MLJ 494, HC (folld)

Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (refd)

YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621; [1997] 4 CLJ 300, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88(2), (3), 92(1)
Penal Code s 352A
Rules of the Court of Appeal 1994 r 7

Honey Tan Lay Ean (Wong Chong Ee with her) (Tan Law Practice) for the appellant.
Rohani bt Ibrahim (Khairul Amin bin Abdullah with him) (Amin, Nizam & Rohani) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant/petitioner husband ('PH') against part of the order of the learned judicial commissioner ('JC') on a divorce petition filed by the PH against the respondent wife ('RW'), seeking for, inter alia, a dissolution of the marriage, custody of children and distribution of matrimonial assets.

[2] For the reasons that follow, we had unanimously allowed the appeal.

BACKGROUND FACTS

[3] PH and RW were married on 23 December 2006. They were blessed with two children, a daughter ('LYR') and a son ('LXJ'). LYR was born on 23 March 2008 while LXJ was born on 23 September 2012. The matrimonial home was at No 14, Jalan Teratak, U8/96D, Bukit Jelutong, Shah Alam, Selangor. There were three other properties which were the subject of the matrimonial dispute, namely:

(a) PTD 74299, Lebuh Putra Utama, Bandar Putra, Kulai, Johor ('the Kulai propety');

(b) No 19, Jalan SP5/3, Taman Segar Perdana, Kajang, Selangor ('the Cheras property'); and

(c) Parcel No K03-07-07, Type F1, Level 07, Building No Block 3 Kechana Square ('the Kenchana Square').

[4] On 17 December 2015, a joint petition was filed. About end of December 2015, RW moved out of the matrimonial home. PH continued to live in the matrimonial home with the children. On 29 December 2015, RW converted to Islam.

[5] On 21 January 2016, a decree nisi was granted which was to be made

absolute after three months. The terms of the decree nisi among others were:

(a) guardianship and custody of the children to be given to PH;

(b) RW's access to the children will be subject to the mutual agreement with PH;

(c) the children would not be influenced into embracing any new religion until they attain the age of majority; and

(d) the Kulai Property be given to RW and the Kencana Square be given to PH.

[6] Before the decree nisi could be made absolute, PH applied to set aside the decree nisi on the ground of RW's conversion. The High Court set aside the decree nisi and PH was given access to the children.

[7] On 23 February 2016, PH lodged a police report against RW on her behavior after the decree nisi. On 24 February 2016, RW lodged a police report against the domestic worker for allegedly molesting LXJ. On 28 February 2016, police commenced investigation on RW's allegation against the domestic worker.

[8] LXJ was admitted to the Shah Alam Hospital between 7–8 March 2016 for examination in relation to the sexual abuse allegation.

[9] On 11 May 2016, RW had unilaterally converted LYR and LXJ to Islam. This unilateral conversion of the children was challenged by PH vide a judicial review proceedings in the High Court Kuala Lumpur. By the decision of the Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145, the unilateral conversion of the children would have been wrong in law.

[10] On 11 May 2016, PH filed the divorce petition. On 6 June 2016, an interim consent order was recorded whereby parties agreed, inter alia, that the children shall not be influenced into practicing any religion, which includes visiting any mosques or places of worship, praying, receiving any religious teaching, wearing of hijab, circumcision and/or fasting during the month of Ramadhan. The other term recorded was on the parties' alternate weekly care and control of the children.

[11] On 11 December 2016, PH was stabbed by RW repeatedly with a metal fork at Subang Jaya Medical Centre ('SJMC'), where LXJ was admitted. A video recording was adduced by PH as evidence in the High Court on the incident. RW was later charged in the Petaling Jaya Magistrates Court for using criminal force on PH.

[12] The trial of the petition commenced on 5 December 2016 and it was first heard by the learned JC who has since retired. The learned JC who took over conduct of the petition continued with the cross examination of PW14 (out of a total of 19 witnesses called by PH). PW14 was the domestic worker referred to earlier. On 27 April 2018, the learned JC delivered her decision. Particularly on the issue of custody, maintenance and division of matrimonial assets, judgment was entered in favour of RW.

DECISION OF THE HIGH COURT

[13] In relation to the issue of custody, the findings of the learned JC may be summarised as follows:

(a) RW and her mother, RW2 were witnesses of truth;

(b) PW14 had behaved inappropriately towards LXJ;

(c) it was improbable for RW to concoct the stories of LXJ being sexually abused as RW is a highly educated woman who would understand the repercussions of perjury and how it would impact her right for custody, care and control of the said children in these proceedings;

(d) the video recording by PH on RW's alleged domestic violence created doubt as to whether it was a genuine or a staged incident; and

(e) it can safely be assumed that PH might need more time to run his companies as compared to RW who is not working full time.

[14] The learned JC acknowledged that by s 88(2) of the Law Reform (Marriage and Divorce) Act ('the LRA'), it is mandatory for the court to consider the welfare of the child as being paramount. Reference was made, inter alia, to *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189. Her Ladyship cited several authorities in support of the proposition that the mother should be entitled to custody of a child during what is called the period of nurture, until the child attains seven years. On the facts, the learned JC found that the presumption that it is for the good of the child below the age of seven years to be with the mother as stipulated in s 88(3) of the LRA, has not been successfully rebutted by PH. Her Ladyship therefore held that the custody of the children, of ten years and five years, respectively, should be with RW. Her Ladyship further found that it was undesirable to disturb the lives of the said children by a change of custody and that unless and until changes in the circumstances dictate, there must be stability, continuity and objectivity in the life of the said children in their growing and nurturing years.

[15] On maintenance of the said children, the learned JC ordered that PH shall pay a monthly maintenance of RM2,000 (with an increase of 10% yearly) per month for each child until they attain the age of 18 years old. PH was also

ordered to pay for the medical and dental expenses of the children, and for the education costs of the said children until the children attained the age of 23 or upon completing tertiary education (first degree), whichever comes first, with the school and university to be agreed to by RW.

[16] In respect of the matrimonial assets, the learned JC ordered that the Kulai property is to be maintained in the name of RW. Her Ladyship found that this asset was acquired by RW and it was never her intention to treat it as a matrimonial asset. As for the Cheras property, the learned JC found that RW was just helping her mother, RW2, in acquiring this property since RW2 was not qualified for a housing loan as her income as a confinement lady was not consistent. In the circumstances of the case, the learned JC ruled that the Cheras property which was irrefutably acquired by RW under the joint name with her mother cannot be held out as being part of the matrimonial property.

[17] As regards the matrimonial home, the learned JC found that although it was acquired by PH before the marriage, the matrimonial home has been substantially improved by RW. The learned JC further found that this fact was corroborated by the evidence of PH when PH acknowledged that RW did contribute towards the matrimonial home before they moved in and that RW did the renovations to the matrimonial home. The learned JC considered the argument by PH that he has repaid RW for her advance using his monies from Public Mutual Fund. Her Ladyship found that this argument was rebutted by RW when she showed proof that the said fund was bought using her EPF money. Her Ladyship therefore ordered that the matrimonial home be sold or disposed of at the prevailing market value and the net proceeds be divided equally between the parties or that either party may elect to buy out the other undivided share (50%) in the said property at the prevailing market value.

[18] Aggrieved by the order of the learned JC on custody, maintenance of the children and the distribution of the matrimonial assets, PH appealed to this court.

[19] After the decision of the High Court and pending the hearing of the appeal, the following incidents occurred, ie:

(a) PH took out contempt proceedings against RW for being in breach of the interim consent order, in particular for bringing the children, inter alia, to the mosque. The High Court dismissed the committal proceedings. The decision of the High Court was reversed by this court. This court found RW guilty of contempt for seven out of 11 charges preferred against her in the contempt proceedings;

(b) on the complaint of domestic violence (see para 11 earlier), RW pleaded guilty for the offence under s 352A of the Penal Code, ie for using

criminal force on PH and was fined; and

(c) RW married Abdul Muein Abd Rahman (who has three teenage children) as his second wife.

[20] The above matters were admitted as further evidence under r 7 of the Rules of the Court of Appeal 1994.

THE APPEAL

[21] Before us, PH canvassed the following issues:

(i) that the sole guardianship and sole custody that was granted by the High Court to RW with only a weekend access to PH, was made without the learned JC assessing the evidence led for PH;

(ii) that the order for maintenance was arbitrarily made without proof of expenses of the children; and

(iii) that in making the order for the division of the matrimonial home, the learned JC failed to consider that it was acquired solely by PH and that the learned JC erred in inclining towards equality of division.

[22] In respect of the issue of custody, the complaint of PH was essentially that the learned JC failed to assess the evidence led for PW and that the learned JC erred in the following respects:

(iv) the learned JC did not consider the unilateral conversion of the children to Islam by RW;

(v) the learned JC did not consider whether RW is a fit mother;

(vi) the learned JC granted sole guardianship to RW without making an finding of fact that PH is unfit to be a guardian;

(vii) the learned JC erred in law when she made RW the sole guardian of the children when Muslim women cannot be guardians of their children; and

(viii) the learned JC failed to consider that the allegations of sexual abuse was for RW to gain an upper hand in the divorce proceedings.

[23] On maintenance, it was highlighted by learned counsel for PH that RW did not tender any evidence to support her claim that the children should receive RM2,000 per child per month. In this regard, it was further submitted that the learned JC had put the cart before the horse, ie she made a finding of fact that since PH's earning was approximately RM22,000 per month, the children should receive RM2,000 per month each for maintenance without any proof as to their monthly expenses.

[24] On the matrimonial home, it was argued for PH that the learned JC erred in law in taking into account the evidence of the alleged contributions of the matrimonial home by RW when it was not put to PH in cross examination that RW paid RM40,000 as renovation costs; when PH during cross-examination admitted that RW did lend him some money and that he had re-paid every single part of it with his Public Mutual Funds; when the evidence of PH on the repayment to the RW was not challenged by RW.

[25] In urging us to dismiss the appeal, in essence, learned counsel for RW submitted that if custody, care and control of the children be given to PH, it will affect the morality of the children; that PH will delegate the task to the domestic worker; that the incident of RW's violence was due to the provocation by PH and that the learned JC was correct on the order made in respect of the matrimonial home as RW had contributed towards the substantial improvement of the asset.

OUR DECISION

[26] The principle of law on appellate intervention is settled. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, the Federal Court reiterated the principle as follows at p 464 (MLJ); p 476 (CLJ):

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah and Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:
>
> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[27] At the outset we wish to state that, applying the above principles, we found no compelling reason to disturb the order of the learned JC on maintenance of the children. It was in evidence that PH earned RM22,000 per month. Section 92(1) of the LRA provides:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be

reasonable having regard to his or her means and station in life or by paying the cost himself. A

[28] Having regard to PH's means, we were of the view that the amount awarded per child per month was reasonable in the circumstances of the case. More so when it was not submitted before us that the amount ordered to be paid by PH should be varied. What was submitted and prayed for by PH was for RW to contribute 30% of the maintenance for the children, which prayer we had dismissed. B

[29] On the division of the matrimonial assets, the grievance of PH was on the order of the learned JC granting 50% of the current market value of the matrimonial home, which was acquired solely by PH prior to the marriage. In this regard, while we agree with the learned JC that there was evidence led on the contributions made by RW for the improvement of the matrimonial home, we were of the view that Her Ladyship erred in granting 50% of the current market value to RW. By s 76(2)(a) of the LRA, in exercising the power of the court to order division of matrimonial assets, the court shall have regard to the extent of the contributions made by each party. In our judgment, taking into account the extent of RW's contribution, what is reasonable would be for RW to be granted 25% of the current market value of the matrimonial home. C D E

[30] The key point of the appeal was on the issue of custody, where the learned JC made the following finding:

> [32] In the present case, both PH and RW hurled allegations of unsuitability and have provided reasons why sole guardianship, custody, care and control of the children be given to them which allows me to conclude that both parties deem the other unfit to parent the said children of the marriage. However, those allegations remain merely that, since both parties could not and/or did not adduce any sufficient materials of probative value to support such allegations. That notwithstanding, I had observed the unrebutted facts that RW took care of the family since 2006 when they were married and until 2012 when they decided to have a maid to assist RW when she delivered the said boy in 2012. At present, RW is not working and is a stay home mother whereas PH is working and is taking care of two companies with income of RM22,000 a month not including dividends, which to my mind shows that his companies are doing well and I can safely assume that he might need more time to run his companies as compared to RW who is not working full time. F G H

[31] Apparent from the above is that the learned JC assumed that because PH had two companies to manage, he would have lesser time to take care of the children. The assumption arrived at by the learned JC was erroneous and against the weight of evidence. PH had testified that he is the Managing Director of only one company (core bundle (Vol 5) p 766). RW had made reference to Geekhouse Sdn Bhd in her answer to petition but a closer look at I

A that pleading by RW revealed that Geekhouse Sdn Bhd has been wound up (core bundle (Vol 5) p 783). In the circumstances, the learned JC was plainly wrong in her evaluation of the evidence which formed the premise as to why, among others, she had granted guardianship and custody to RW.

B **[32]** On domestic violence where RW had caused the PH to suffer injuries by stabbing PH with a fork, the learned JC stated that:

> [33] PH argued that RW's act of domestic violence against PH in the presence of both the children had also amounted to domestic violence against the children and the children were referred to a psychiatrist. I take note that this report is the work of a private practitioner appointed by PH. At this juncture I take this report with caution and tread carefully as it could be self-serving of the party and it is not by a duly court appointed professional for purpose of impartiality. However, I had objectively observed and noted that the marriage between PH and RW lasted for ten years without any evidence to show there was any issue of violence or domestic violence against PH and/or the said children. As can be seen the allegation of domestic violence only (sic) arise when RW decided to leave the marriage. I refer to the issue of domestic violence, the incident at SJMC where the RW was alleged to have injured PH with a fork. ... The fact that PH was busy recording the whole incident lead me to infer safely that it was done on purpose and was not to be taken as an impromptu incident as such. It therefore raises the question or put us on inquiry as to whether it was genuine or a staged incident which created doubt in my mind on the veracity of the recording ...

[33] We found that the learned JC erred in doubting the veracity of the recording when there is overwhelming evidence including that of RW's own admission under oath that she had stabbed PH with a fork in front of the children. The learned JC had stated that the said altercation between PH and RW was not without provocation from PH. She opined so because PH seemed to be impatient and seemed to be chasing RW away from the hospital ward when he kept taunting and repeating the words that RW's time was up. Her Ladyship had also found that PH had failed to accord RW cordiality, understanding and compassion for a mother to spend time with a sick child at that time.

[34] In coming to the above conclusion, the learned JC had overlooked the fact that RW and PH had entered into a consent order dated 6 June 2016, where parties had inter alia agreed that the children shall reside with the parties on an alternate basis for a week from 6pm on Sunday until 6pm the following Sunday. It goes without saying that the consent order must be observed.

[35] After spending the whole week with the children, RW had unilaterally admitted LXJ into SJMC on the last day of her time. RW was supposed to hand over the children at 6pm on 11 December 2016, ie the date when the incident of domestic violence happened. The transcript of the video recording showed

that she was with the children at SJMC past 6.45pm, which means that PH had in fact allowed RW to be with the children for at least an extra 45 minutes. To say that PH had not accorded RW cordiality, understanding and that he was impatient was, in the circumstances not quite accurate.

[36] Even assuming for a moment that PH had not accorded RW such cordiality and understanding for her to be with LXJ, we found no such provocation which could justify RW to consciously and deliberately injure PH in front of the children and in public. Surely there were other ways in which RW may monitor LXJ's condition. RW however chose to ignore the terms of the order that she had consented to. It must be noted that the existence of domestic violence, is a relevant consideration in determining whether custody ought to be granted to a parent, as undeniably, the abuse of a spouse in front of the children is harmful to the emotional well-being of the children. We further took into serious consideration that RW had on 11 July 2018, pleaded guilty to the amended charge under s 352A of the Penal Code in relation to the incident at SJMC. She has since been convicted for the same.

[37] The learned JC failed to judicially consider the evidence as a whole before concluding as she did on the issue of domestic violence. In our view, what happened at SJMC was the manifestation of the uncontrollable temper of RW. She was capable of hurting not only PH physically but the children as can be seen from the injuries suffered by LXJ whose ear was blue black after it was pinched by RW. Having seen the picture of the LXJ's ear, we were unable to accept that RW was merely trying to discipline LXJ. While it may be RW's right and duty to discipline LXJ, we failed to see how LXJ has to be subjected to such physical abuse at the tender age of three years old.

[38] The learned JC stated that she had on 18 August 2017 met and interviewed the children where they had expressed their wish to stay with their mother and that she had taken due cognisance of this fact. In this regard, we endorsed the words of Edgar Joseph Junior J in *Re KO (an infant)* [1990] 1 MLJ 494 that:

> ... how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court. In *G v G*, Dunn LJ said that it was extremely dangerous to place decisive weight upon the wishes of the children at the age of twelve who were extremely suggestible and reluctant to upset their parents and are very protective towards them.

[39] On the allegation of sexual abuse by the domestic worker, we found that the following findings of the learned JC were arrived at without sufficient judicial appreciation of the evidence:

> [34] Regarding the alleged sexual abuse by PW14 against the said boy, it is to be

> noted that sexual offences are offences in secret and I find the evidence of RW to have been corroborated by the evidence of RW2 who saw the incident with her own eyes. It was further corroborated when PH admitted in his evidence when he asked his son about the incident where the said child said 'Kakak touched my kuku-bird and I liked it'. ... To any informed mind, any sexual allegation from a child should not be simply brushed aside because the child generally do not know how to lie on matters that's not within their knowledge and all the more so when the said child was not even four years old then, who can described what PW14 did to his private part (which he referred to as kuku-bird) and one wonders how a child of that age knows about the sexual act, ie 'the doggy style sex position' with the toys at the playground. ... RW had acted correctly on the incident between the said boy and the maid by lodging a police report asking for an investigation into the matter. In all the circumstances of the case, I find it improbable for RW to concoct these stories as she is a highly educated woman that would have understood the repercussions of perjury and how it would impact her right for custody care and control of the said children in these proceedings.

[40] The learned JC accepted the evidence of RW on the allegations of sexual abuse by PW14. The acceptance of the evidence of RW is with respect, erroneous as the learned JC failed to consider and evaluate the evidence adduced by several independent professional witnesses.

[41] The Welfare Officer, Puan Rohaya bt Ramli (PW3) was responsible in investigating the allegations that PW14 had sexually abused LXJ. Her evidence did not support the finding of the learned JC on the sexual abuse of LXJ. PW3 had stated, inter alia, that 'kanak-kanak tiada kesan deraan emosi, fizikal atau perlakuan seksual, ... yang disyaki oleh ... pembantu rumah.'. Her finding was recorded contemporaneously in a letter dated 10 March 2016 to the *Pegawai Perubatan* Hospital Shah Alam as follows:

> 2. Hasil perbincangan antara Pelindung JKM Shah Alam (Rohaya binti Ramli dan Pegawai Perubatan (Dr Nazalul) pada 10/03/2016 mendapati hasil pemeriksaan kejadian *tidak seperti* yang didakwa oleh ibu kandung kanak-kanak. (Emphasis added.)

[42] The child psychiatrist from the Tunku Ampuan Rahimah Hospital, Dr Salinah Akhtar bt Mohd Yusof (PW6) who was part of the Suspected Child Abuse and Neglected (SCAN) Team testified on her assessment of LXJ. It was the evidence of PW6 that children with suspected sexual abuse will have some sexualised behavior. This was how she explained herself:

> Sexual behavior in child can be presented in various ways. Sometimes ... fondling with themselves, sometimes they start touching inappropriately or asking certain sexual questions to parents, which is ... not appropriate for that age ...

[43] Apart from stating that during her assessment of LXJ she did not see any

sexualising behavior, the evidence of PW6 also revealed that there was no post traumatic symptom on LXJ. Hence, there was no evidence from PW6 to lend credence to the findings of the learned JC that LXJ had been sexually abused by PW14.

[44] There was also the evidence of the paediatrician, Dr Nazatul Haslina bt Ramly (PW10) who had conducted an examination of LXJ. PW10, another member of the SCAN Team likewise did not support the finding of the learned JC that LXJ had been sexually abused. For ease of reference we reproduce below the relevant part of her evidence (CB (Vol 2) pp 209–210):

> So, after, after examination, normal. We actually get the surgical team also to examine him and the MO, the medical officer examine him, the finding is also normal. Then, we refer the child to a child psychiatrist ... for her to assess the whole behavior, ... the patient's behavior.

[45] On the concerns of RW that LXJ had erection, PW10 stated, inter alia, that 'even foetus, male foetus have erection in the uterus ... a man can have an erection when his bladder is full' and that 'it is a very normal thing to have erection for a male of 3 years old.'.

[46] The investigating officer, Insp Noraida Hanim bt Ahmad Roslan (PW15), had stated quite categorically that 'Puan Aleena (the RW) menegaskan yang report ini dibuat untuk rujuk kepada pihak mahkamah ... untuk proses perceraian.'. It was also the evidence of PW15 that '... *kes ini tidak diteruskan*'. (Emphasis added.).

[47] Given the above testimonies of the independent witnesses of the paediatrician, the child psychiatrist, the welfare officer and the police officer, we found that the learned JC was plainly wrong in concluding that RW (RW1) and her mother, RW2 were witnesses of truth and that there was inappropriate behavior by PW14.

[48] Insofar as the allegation that LXJ claimed that PW14 had inserted a pencil in his anus as found in the notes of Dr Latchana a/p Tangarajo (RW3) was concerned, we noted that this claim came about from the translation/interpretation of a Chinese doctor who did not testify. As such it was our judgment that not much weight could be attached to the notes of RW3. Furthermore this allegation was never put to PW14 herself, which supports the argument of learned counsel for PH that this allegation was an afterthought (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300; *Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd* [2007] 3 MLJ 597). Likewise the allegation of 'doggie style sex position' was only raised by RW's

counsel during the examination-in-chief of RW2.

[49] Further, we found that the learned JC had not fully appreciated the facts in coming to her decision. It was in evidence that LXJ had a medical condition called hydrocele, ie a swelling of the scrotum. PH and RW had begun the traditional treatment of applying betel leaves on LXJ's scrotum before September 2015 and it was this traditional treatment that was carried out by the maid, PW14 on LXJ before the marriage broke down irretrievably. Thereafter PW14 no longer carried out the traditional treatment. When LXJ referred to 'kakak touched my kuku-bird', on the facts, that was in relation to the incident prior to the break-down of the marriage. The police report lodged by RW in February 2016 on the allegation of sexual abuse by PW14 in relation to the traditional treatment for the medical condition of LXJ, clearly cannot be maintained, in light of the circumstances as revealed in this case.

CONCLUSION

[50] For about two years, each party had the children's care and control on an alternate weekly basis. The order of the High Court had effectively disrupted the children's routine. Now that RW has remarried, the children's lives will be further disrupted and subjected to drastic changes, as they now have a step-father and step siblings.

[51] In seeking for the sole custody of the children, we found that RW was putting her own interest above that of the children's. RW had brought the children to the mosque and she had planned to enrol the children in an Islamic school, although it was agreed in the consent order of the court that the children shall not be influenced into embracing any new religion until they attain the age of majority. Having little regard for the safety of her children, RW had also on 6 June 2018, lost LYR after performing her prayers. LYR, on her own, had walked back to PH's house from the mosque, arriving at PH's house around 10pm, scared and in tears.

[52] In light of all the above, we found merits in the appeal. We therefore allowed the appeal and we set aside the orders of the High Court on guardianship, custody care and control of the children save for prayers at paras 53.8, 53.11, 53.13 and 53.14 of the *hujahan balasan perayu* dated 12 September 2018. PH was granted the sole guardianship, custody, care and control of LYR and LXJ and RW was granted access to the children (the details are as set out at paras 53.2–53.7 in the *hujahan balasan perayu* dated 12 September 2018). We allowed the prayer sought for by PH that the matrimonial home be registered in PH's sole name and that the said property shall remain with and be retained by PH on condition that PH pays RW 25% of the current market value of the property as assessed by a licensed valuer, to be

appointed by RW, with the costs of the appointment to be borne by PH and RW equally. We made no order as to the costs of the appeal. Liberty to apply.

Appeal allowed; and orders of High Court on guardianship, custody care and control of children set aside.

Reported by Nabilah Syahida Abdullah Salleh